

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Pork Antitrust
Litigation

File No. 18-cv-1776
(JRT/JFD)

Zoom Video Conference
St. Paul, Minnesota
Wednesday, October 5, 2022
4:03 p.m.

BEFORE THE HONORABLE JOHN F. DOCHERTY
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(MOTIONS HEARING)

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15 Proceedings recorded by mechanical stenography;
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P R O C E E D I N G S

IN OPEN COURT VIA ZOOM VIDEO CONFERENCE

THE COURT: Good afternoon, everybody.

My name is John Docherty. I am the new federal magistrate judge assigned to this MDL, after Judge Bowbeer, who I am sure you all got to know over time, retired. So good to meet all of you.

We are here today for a hearing on a discovery dispute brought by direct action plaintiffs.

And I have read the materials. I think I understand the parameters of the argument. I have some questions for both sides, and I don't anticipate making a ruling from the bench today. I anticipate instead that I'll be writing on this.

So why don't we begin with the moving party. And I believe that that would be -- is it Mr. Eddy?

And I'll just say I don't run motions hearings with the rigor of an appellate argument or anything close to it. I'll hear what you have to say.

I would suggest, Mr. Eddy and -- will it be Ms. Aberg primarily on the defense side?

MS. ABERG: Yes.

THE COURT: Okay. I'd suggest 20 minutes per.

And, Mr. Eddy, if you want to reserve some of your time for rebuttal, that's fine. However, there's no red

1 lights, there's no yellow lights, and at times you will find
2 that I will just stop you and ask the other side to respond
3 like on the spot to something that you've just said.

4 But, Mr. Eddy, if you are ready, the floor is
5 yours.

6 MR. EDDY: Thank you, Your Honor. And glad to
7 make your acquaintance after Judge Bowbeer.

8 I will be arguing certain DAPs' motion to compel
9 the four defendants at issue to produce certain structured
10 sales data for four pork products that were excluded from
11 their production.

12 As I understand defendants' argument, class
13 counsel and the defendants negotiated a discovery agreement
14 in the early part of 2021 to exclude four types of products,
15 franks or hot dogs, multi-ingredient products like
16 pepperoni, pork products called offal, O-F-F-A-L, not
17 A-W-F-U-L, which are lungs, hearts, cheeks, et cetera, and
18 then the byproducts from processing called renderings, which
19 includes hog proteins, intestines, et cetera.

20 Defendants admit that they sold these products to
21 moving DAPs. For example, Nestle Purina purchased
22 \$780 million of these products from JBS, Smithfield and
23 Tyson. Defendants admit that they have these structured
24 data for these products. Defendants do not and cannot
25 contest clear relevance of these data to our claims. For

1 example --

2 THE COURT: Well, they, they rather do, though, I
3 thought at least, after reading their materials. And I'm
4 talking, specifically, this is a case about allegations that
5 the price of pork was fixed. A pig goes into a
6 slaughterhouse, and it comes out as pork.

7 When you're asking for data on pepperoni for --
8 and, I mean, the defendants were all over this -- breakfast
9 burritos and such, aren't you, aren't you going from a
10 commodity to a non-commodity? Isn't your argument analogous
11 to you fix the price of steel; therefore, we want to know
12 about automobile prices because there is steel in
13 automobiles.

14 So as to some of these categories -- one of these
15 categories, particularly the third, I'm not saying that
16 there's a winning argument or a losing argument; but when
17 you say that there is no argument about relevance, I'm
18 pushing back a little bit on that.

19 MR. EDDY: That's fine, Your Honor, and that's
20 fair. They make a passing effort.

21 But the bottom line here is the class and the DAPs
22 allege that defendants conspired to reduce the supply of
23 hogs and to reduce the supply of pork. This is clearly a
24 rising tide floats all boats. And the defendants recognize
25 in the data they buy from Agri Stats and the data they get

1 from the USDA and their own materials that these products
2 are pork products.

3 And I don't know if that is sufficient to answer
4 the relevance, but similar data was requested and produced
5 in the Broiler Chicken case. There was no fight over the
6 relevance of offal renderings or further processed products.
7 It was all produced by 20-plus defendants. And I'll come
8 back to the Broilers case, because that has a lot of
9 relevance to what's going on here.

10 We have made clear that these data are needed by
11 our economic experts to assess the antitrust impact of
12 defendants' conduct and the antitrust damages which we
13 allege are caused by this conduct.

14 THE COURT: When did you make that clear? Because
15 I'm concerned that we're here with about a month to go in
16 the fact discovery deadline, or until the fact discovery
17 deadline, and that there was a November 1st of 2021 deadline
18 for DAP-specific data to be requested. And it looks like
19 you're in negotiations with the defendants and, according to
20 them, didn't raise the possibility that you would be seeking
21 this data for quite some time.

22 MR. EDDY: Actually, Your Honor, they are right in
23 one sense. We used the same definition of "pork" as the
24 classes did. But a significant issue with that is the
25 defendants negotiated exclusions from that "pork"

1 definition, recognizing that these four products were called
2 for and that the only way they could not produce them was by
3 agreement. So we weren't surrendering these products in our
4 definition. And the defendants knew these products were at
5 issue in our complaints, which we filed a year and a half
6 ago, and we clearly defined broad definition of "pork" in
7 those complaints.

8 THE COURT: Well, Mr. Eddy, are you saying that
9 they should have seen that in your complaint and then
10 reached out to you and said, hey, where's your motion to
11 compel the production of this material? I mean, surely not.

12 MR. EDDY: Well, no. They know that it's relevant
13 to our claims. That's -- you can't say -- I mean, we
14 specified these pork products at issue in our complaints.
15 The problem is defendants have never answered those
16 complaints and perhaps never even read them, though they
17 should have.

18 And this issue of non-production of excluded data
19 didn't become clear to us and other DAPs until 2022. As you
20 can see from -- pardon me -- the expert -- exhibits,
21 defendants in fact put in 16 and 17, which are January 2022
22 emails where other DAP counsel are asking about what's --
23 that there appear to be data that are missing, and
24 Exhibit 13, which is a February 2022 letter from Tyson
25 Prepared Foods to another DAP firm, in which they say Tyson

1 Prepared Foods sales data includes further processed
2 products, including pork products like lunch meat and
3 sausage. Nowhere in that letter did they say they were
4 excluding those products.

5 Our economic consultants were given all these
6 data, which came in in bulk and in dribs and drabs,
7 depending on the defendant, and it was not until early March
8 it became clear that there were major gaps in some of the
9 productions.

10 I reached out to Clemens Food in March of 2022
11 asking if they had excluded these products. They said no,
12 they produced them all. Other DAPs reached out to the other
13 defendants. And it was in May of 2022 that we wrote a
14 letter saying, okay, we now see that there's an issue here
15 and that a number of defendants have not produced these
16 data.

17 It was a confusing period because we got it wrong
18 in that letter, Your Honor. We said that Tyson had complied
19 and produced the data. That was a mistake on our part. And
20 Tyson did not correct that mistake until two and a half
21 months later on August 10th. So that began the
22 meet-and-confer process with these defendants. Defendants
23 do not argue that we failed to meet and confer with them.
24 And we started in May, and that went through early
25 September.

1 Now, part of the defendants' argument is some sort
2 of delay and waiver by us, but we were negotiating with them
3 until September 1, when it became clear we were at a
4 complete impasse.

5 Our efforts to meet and confer also included
6 efforts to compromise. We know that under the judge's
7 order, Judge Tunheim's order in March of 2022 approving the
8 Sysco -- excuse me -- Smithfield and JBS class settlement
9 context and claim forms the broad definition of "pork" that
10 we have in our complaints was approved by the court and that
11 notice went out and claim forms went out with that broad
12 definition of "pork." Accordingly, the claims administrator
13 required all the data relating to those excluded products
14 and the broader definition. So the court directed that they
15 produce all of their sales data, and defendants did so.

16 Seaboard, after we wrote our May letter, produced
17 the data it provided to the claims administrator, and that
18 we have no objection with. It is structured data.

19 We asked JBS and Smithfield to give us a sample of
20 the data they produced and hoping that perhaps that would
21 suffice for our experts. They gave us a sample, and we
22 provided it to our economic consultants, and it was
23 high-level summary and did not meet what -- the demands of
24 our economic consultants.

25 THE COURT: And that gets me to the next point to

1 what I want to talk to you about most, which is
2 proportionality and undue burden, because high-level stuff
3 you've just said doesn't, doesn't meet the bill and you need
4 more detailed material. The defendants are at pains and
5 take many pages to explain how onerous it is to produce this
6 material.

7 Let me ask you this. You're asking for four
8 additional categories. How many categories do you have now?

9 MR. EDDY: That depends. It varies by defendant.
10 For example, I understand Smithfield produced more than
11 10,000, 10,000 products, Hormel 4,000 -- I'm doing this off
12 the top of my head.

13 THE COURT: That's fine. I'm just trying to get a
14 ball park. I mean --

15 MR. EDDY: So, in other words, this is four
16 products versus many thousands, Your Honor.

17 THE COURT: Okay. So what's the incremental value
18 of four when you're talking about a universe of many
19 thousands?

20 MR. EDDY: For example, Your Honor, I pointed out
21 Nestle Purina.

22 THE COURT: Right.

23 MR. EDDY: The almost \$800 million that's bought
24 from these defendants is not in their data. So our economic
25 consultants can't look at the pricing by weight or over time

1 for Nestle Purina. And unless we get that data, Nestle
2 Purina is left on an island without expert support.

3 And the other clients who are involved would
4 buy -- Compass Group bought franks. Nestle USA and Conagra
5 bought multi-protein products like pepperoni and salami.
6 And I'm not saying that the experts will find that there was
7 damages with those multi-protein products, but they need to
8 look at it. They need to assess.

9 THE COURT: Okay. I take your point they need to
10 look at it. Now, Nestle is enormous, a very sophisticated
11 multi-national corporation. You are looking for sales data.
12 Surely, Nestle has got purchase data. Isn't this material
13 available to your client? And under Rule 26, since one of
14 the factors I need to look at is the parties' relative
15 access to information, what about looking in your clients'
16 own files for this material?

17 MR. EDDY: We have done that, of course, Your
18 Honor. Unfortunately, and it is just almost universal in
19 antitrust cases, the buyers don't have the same level of
20 detail, the same time period, the same robustness of data as
21 the defendants. We have produced the data for Nestle USA
22 and Conagra and Nestle Purina to defendants, and they don't
23 make an argument that that data is sufficient unto our
24 purposes, because it is not. We have given them what we
25 have. And it's just not adequate for the kind of

1 transaction-level analysis that economists need to engage
2 in.

3 Shall I keep talking, or do you have other
4 questions?

5 THE COURT: Well, you've used -- you've got about
6 seven minutes. You've used about thirteen. Give me an idea
7 how much you would like to spare for rebuttal after
8 Ms. Aberg has her say.

9 MR. EDDY: Well, I do want to point to the
10 defendants appear to make much of Judge Bowbeer's
11 December 2021 IDR.

12 THE COURT: But the question was, How much time do
13 you want for rebuttal?

14 MR. EDDY: Oh. And I have seven minutes left?

15 THE COURT: Roughly. I mean, as I say, this
16 isn't, this isn't ultra --

17 MR. EDDY: Well, I would like to reserve five,
18 Your Honor.

19 THE COURT: Sure.

20 MR. EDDY: And I didn't realize I was taking so
21 much time. My apologies.

22 THE COURT: No, no, no. That's all right.

23 So anyway, Judge Bowbeer, because -- yes, I mean,
24 she does say we're not writing on a clean slate. You did,
25 you and your clients did join an MDL already in progress,

1 and perhaps it wasn't your wish to do so, but you are asking
2 to have rather a lot of settled expectations upended. And
3 presumably the old DAPs knew what they were doing when they
4 negotiated this and they gave -- they got something in
5 exchange for giving up or conceding on these four categories
6 that you now want.

7 MR. EDDY: Your Honor, class counsel are
8 competent, excellent lawyers, but they were not -- they
9 don't have the same claims as the individual DAPs, and they
10 focus on high-level products. If you look at their expert
11 reports, they've cut down their products at issue quite a
12 lot.

13 And at that December hearing before Judge Bowbeer,
14 she found that where DAPs were asking for additional search
15 terms to be applied, they had not shown that there was
16 documents missing or that there were gaps. Defendants here
17 admit that there are gaps. And Judge Bowbeer said if you
18 can show me that there are gaps and things are missing,
19 that's a different analysis for us and that would shift the
20 proportionality assessment to the defendants. There's no
21 issue here that there are gaps. They admit to it.

22 Also, Your Honor, Judge Tunheim's November 14
23 order of consolidation recognized that there are differences
24 between the cases which may create individualized discovery,
25 and the court can accommodate these issues as necessary to

1 ensure each member case is resolved on its own legal merits.
2 And that's what we're asking for here.

3 I will reserve my time, Your Honor, since I guess
4 I'm probably down to five minutes.

5 THE COURT: You will.

6 Is anyone else going to have something to say for,
7 for the DAP clients?

8 MR. AHERN: Yes, Your Honor. This is Patrick
9 Ahern --

10 THE COURT: Hi.

11 MR. AHERN: -- for the Winn-Dixie plaintiffs.

12 I was there when the, the purported agreement
13 binding my clients was entered into. We did not agree to
14 the exclusion of the four categories. I wrote an email to I
15 think Mr. Taylor -- oh, no -- actually to Ms. Strange,
16 maybe, setting forth our position, did not hear back until
17 7:30 on the, on the deadline for us to meet and confer. We
18 then had a meet and confer a few days later and they just
19 said, well, you are too late.

20 The classes and Puerto Rico for their own reasons
21 decided that they would, they would exclude some of these
22 products in return for -- I think it was a slightly longer
23 data period. The classes and Puerto Rico interests are not
24 aligned with either the Winn-Dixie DAPs' interest or the MDL
25 DAPs' interest. The retail grocery store has --

1 THE COURT: Can you elaborate on that a little?

2 MR. AHERN: What's that?

3 THE COURT: Can you elaborate on that a bit?

4 MR. AHERN: Well, retail grocery stores and even
5 wholesalers are in the business of creating or carrying a
6 number of products that contain pork. And, you know, we
7 said in our email, which I think is attached to the
8 briefing, and we said something that doesn't have an
9 insignificant amount of pork, that's an issue for the
10 experts to decide what our damages are. If this is a
11 conspiracy that is alleged to reduce the supply of pork, but
12 also of hogs, which it is, by relating to the hog slaughter,
13 then, then Mr. Eddy is right; a rising tide does raise all
14 boats.

15 And it is not an issue of relevance in terms of --
16 at this stage. It's an issue of whether or not the experts
17 will be able to, will be able to say that there was an
18 increase in price from, from, you know, a breakfast sausage
19 sandwich. I mean, breakfast sausage sandwiches, frozen or
20 otherwise, are very popular. I don't see any reason why,
21 quite frankly, that that should be excluded from the case
22 based on the, based on the conspiracy alleged.

23 THE COURT: Well, writing on a universal level,
24 perhaps not; but in the give and take of negotiations where
25 someone said says we will give you a longer period of

1 discovery in exchange for you yielding on this, I'm not sure
2 why I wouldn't recognize that.

3 MR. AHERN: But we didn't agree.

4 THE COURT: Well, yes, you didn't agree. I
5 agree -- you are right. But, on the other hand, here we are
6 a month from fact discovery and now it's, well, our experts
7 didn't notice this and so please, you know --

8 MR. AHERN: I would look at it, yeah, I would look
9 at it slightly differently and that is to say, number one,
10 we were the only DAP in the case. So it was very difficult
11 for us to say let's hold up this entire agreement that's
12 happening with the classes in Puerto Rico and all the
13 defendants. We made our position known. They were on
14 notice. For them to say there's undue burden now, when they
15 were on notice then, I think is not, is not something that
16 is really sustainable. They were on notice that there was
17 this disagreement. They met and conferred with us and all
18 they said was, oh, you are just too late, when we got their,
19 when we got their response at 7:30 p.m., 7:25 p.m. on the
20 date when we're supposed to raise the issue with the court.
21 And then we had the meet and confer a few days later.

22 So, I mean, I don't know if it's a bum's rush or
23 whatever it is, but, in any event, it was -- we made our
24 position known a week before, and they, they went ahead
25 without it, and they went ahead without resolving it, and so

1 they were on notice. I think their claims of any kind of
2 burden or prejudice have to take into consideration that
3 fact.

4 Thank you, Your Honor.

5 THE COURT: Thank you.

6 Anyone else for the direct action plaintiffs
7 before we go to defendants or -- yeah.

8 Okay. Ms. Aberg, you are up. And, first of all,
9 am I pronouncing your name correctly?

10 MS. ABERG: Yes, Your Honor.

11 THE COURT: Okay. Thank you. You have the floor.

12 MS. ABERG: All right. Thank you.

13 THE COURT: So let's start off here where
14 Mr. Ahern ended, which is that your 34-page memo devotes
15 many, many pages to just a numbing recitation of burden, of
16 numbers, of fields, numbers of data points, numbers of
17 transactions, et cetera, et cetera. Isn't that argument
18 sustained, though, drawn by the fact that you were on notice
19 that these four fields had been excluded as to parties who
20 were not members of the agreement to exclude them?

21 MS. ABERG: So, Your Honor, I think our position
22 on that would be that Mr. Ahern was very much a party to
23 that agreement. He was invited into those discussions.

24 I think he's saying now that he didn't have a very
25 strong bargaining position because he was outnumbered by the

1 class plaintiffs, but we as defendants definitely, you know,
2 made it a priority to bring him along for the ride. We
3 recognized that he had an interest. And we wanted everyone
4 on board because we did want this finality and we did want
5 certainty before we undertook the burdensome endeavor of
6 collecting the data.

7 Now, we were --

8 THE COURT: One other question at this point.

9 MS. ABERG: Yes.

10 THE COURT: When was this agreement negotiated and
11 finalized?

12 MS. ABERG: The agreement was negotiated in
13 February and March of 2021, finalized as of the beginning of
14 April of 2021.

15 THE COURT: Now, I'm going to pause for just one
16 moment because, as I warned I might, I'm going to go to
17 Mr. Ahern.

18 Mr. Ahern, another way to look at this is that
19 you've been on notice since February and March of 2021, when
20 you were outvoted in the negotiations or whatever happened,
21 that you weren't getting these four fields of data that you
22 think you are now saying is important to your client. Here
23 it is October of 2022, and we're finally in court trying to
24 compel that. How does that factor into my analysis? I
25 mean, you were there, you were in the room.

1 MR. AHERN: Well, I mean, I kind of wasn't in the
2 room in the sense that they, they -- but they, no, they knew
3 from the very beginning -- and this idea of bringing us
4 along didn't happen. They knew from the very beginning,
5 but, anyway, they knew from the very beginning what our
6 position was. We were clearly not part of this agreement.
7 Okay.

8 THE COURT: Okay. Sure.

9 MR. AHERN: But going to Your Honor's --

10 THE COURT: Absolutely, but you were there.

11 MR. AHERN: But going to Your Honor's point. So,
12 once again, we're the only, we're the only DAP for a long,
13 long time, and then the MDL is created and then the MDL DAPs
14 come in. This was the appropriate time, once they came in,
15 to raise this issue on a more global level, you know. And
16 it has much more importance and significance -- I mean, we
17 have, you know, probably, you know, tens or hundreds of
18 millions of dollars out of our 1.6 to 2 billion in purchases
19 relating to these breakfast sandwiches and that type of
20 thing.

21 THE COURT: Okay.

22 MR. AHERN: But we have, but we have other DAPs
23 who have much greater --

24 THE COURT: Mr. Ahern.

25 MR. AHERN: Sorry.

1 THE COURT: Mr. Ahern.

2 MR. AHERN: Yes, Your Honor.

3 THE COURT: My narrow question.

4 MR. AHERN: Yes, sir.

5 THE COURT: On February and March of '21 you knew
6 that these four fields were being excluded because you're,
7 as you said it, I was -- you started your remarks by saying,
8 I was in the room when this was negotiated.

9 MR. AHERN: Well, I mean, I made it known to the
10 classes and to the defendants that this is not something
11 that we were going to sign on to. And on, and on I think it
12 was, I think it was April 2nd of 2021 really was when this
13 was, was, quote, unquote, agreed to, because I think the
14 deadline was May 5th of 2021 for us to finish meeting and
15 conferring and bringing this, and then there was a --
16 bringing this to the magistrate's attention.

17 But my, you know, my view is that, my view is
18 that, once again, we were very clear about the fact that we
19 were not on board with this agreement, that we felt -- we
20 made a proposal to the other side. It was rejected. And
21 the point was that, that the time for raising this was best
22 done, because I don't want to prejudice the other DAPs
23 coming in, by going and, and making a motion to compel and
24 then, and then, for whatever reason, getting that motion
25 denied --

1 THE COURT: Okay.

2 MR. AHERN: -- because I have, I have --

3 THE COURT: Mr. Ahern, thank you. I've got what I
4 need. I appreciate it.

5 MR. AHERN: Okay. Sure.

6 THE COURT: Ms. Aberg, back to you.

7 MS. ABERG: Yeah. Sure.

8 So just to finish up on that point, I mean, our
9 position is certainly that Mr. Ahern was on notice. If he
10 was not happy with the agreement, that he should have moved
11 to compel the data and he should have moved quite a long
12 time ago, because he was part of those discussions, so --
13 and he did not.

14 As to his statement that the defendants told him,
15 you know, too bad, it was -- the statement was clear from
16 defendants, which was if you don't like this agreement,
17 which is reached now here in April of 2021, we are not set
18 at this time to produce the data until September. There's
19 many months in between there where it would have been the
20 time to move and get a court order that we have to produce
21 more than we did, and he didn't. So that's our position on
22 that.

23 THE COURT: Okay. So now let's talk about what
24 Judge Bowbeer said, because that has been quoted by you,
25 again, rather extensively in your memorandum. But is it

1 correct that she said also, in addition to what you've
2 quoted, that if you show me gaps in the production, that
3 will be a different story or words to that effect?

4 MS. ABERG: Yes, Your Honor. And our position on
5 that -- I understood that was part of the argument that
6 Mr. Eddy made as well -- we don't agree. We don't admit
7 that there are gaps.

8 So the relevant definition that was propounded to
9 us in the RFPs, issued not by class plaintiffs, but by DAPs,
10 defines "pork" in a manner that we contend does not include
11 these products. It doesn't include the products that
12 they're now seeking.

13 And when we talk about the negotiations that took
14 place between defendants and the class plaintiffs and the
15 early DAPs on the product scope, it is not correct, as
16 Mr. Eddy says, that we were negotiating exclusions from the
17 definition. That's not what we were negotiating. We were
18 negotiating how to interpret the definition of "pork." And
19 we agreed with the parties to the case at that time that the
20 definition in the RFPs that the class plaintiffs propounded,
21 which was identical to the definition in the DAPs' RFPs,
22 didn't include these products.

23 THE COURT: Got it. You can go on.

24 MS. ABERG: Got it.

25 So the main arguments I want to cover are really

1 twofold. We contend that the motion should be denied,
2 first, on timeliness grounds, as we started to discuss, and
3 then, second, on the grounds that the discovery sought is
4 not proportional to the needs of the case, both because it
5 is not relevant, and that's mainly because of the RFP that
6 was issued, and then also because the burden, as Your Honor
7 has alluded to, is very significant to produce this data.
8 And that's something that, you know, we all, we all know
9 very well and, as you said, we devoted a lot of space to
10 that.

11 But starting with timeliness, we contend that this
12 request is way, way too late. And while we point out in our
13 brief that the DAPs have flouted applicable case deadlines
14 in waiting till now to file this motion, even more
15 fundamental is that their delay threatens to disrupt the
16 progression of this case. The relevant agreement on what
17 constitutes "pork" was struck 18 months ago. And all the
18 discovery that has occurred since then has been guided by
19 that understanding.

20 The parties recognized that it was essential to
21 agree on the products scope first, prior to data production.
22 We agreed on that nearly two years ago. And that was
23 because we recognized that the product scope was really a
24 building block on which a ton of work was going to be
25 premised. Data collection is burdensome, so it was crucial

1 that we agreed on the scope before we started to collect.

2 And that's what we did.

3 There were months of discussions about defendants'
4 databases, about the time frame of the data, and that was
5 hotly negotiated, and about the products scope. And, again,
6 all of this was done because all the parties recognized that
7 this scoping exercise was a gating item. Defendants needed
8 to understand the scope of products before we could collect
9 data, and we only wanted to do that once.

10 Now, the parties did reach an agreement on
11 products scope as of early April 2021, and it was agreed
12 that all of the products that DAPs now seek would be
13 excluded.

14 And on that point I do just want to address
15 briefly Mr. Eddy's point that this is four products out of
16 thousands. That's not accurate. It's four categories of
17 products. Even within, you know, how the, how the DAPs
18 describe it in their brief, they've listed out multiple
19 products under each of these categories. There are
20 thousands of products under these categories. So it is not
21 four products. It's four categories.

22 But the agreed limitations on the product scope
23 were no secret from the DAPs. Most of the DAPs who are
24 moving now actually began participating in discovery
25 discussions before defendants even produced the data at

1 issue. The DAPs knew that defendants were working toward a
2 September deadline to produce the data. They also knew in
3 advance that those productions would not include that the --
4 the products they are now seeking. They received from
5 defendants the relevant discovery correspondence summarizing
6 the product scope agreements in August of 2021, when they
7 started participating in the case. And then DAPs waited
8 until May of 2022 to inform defendants of their refusal to
9 abide by that agreement, even though they had learned of it
10 nine months prior. And it was through this May 2022 letter
11 that DAPs put defendants on notice of their present
12 position, that they need data on products like blood and
13 burritos.

14 Now, DAPs' inexcusable delay here really threatens
15 to disrupt the case schedule and to prejudice the
16 defendants. Requiring defendants to go out and seek new
17 data at this late stage would be extremely prejudicial. It
18 was a massive effort for defendants to collect and produce
19 data over a year ago. And to do it all over again at this
20 even more active stage of the case would be even more
21 challenging.

22 THE COURT: Well, we're not talking about doing it
23 all over again. We're talking about adding data to the data
24 that's already been produced.

25 And while I take your point that, you know,

1 generally, your argument is they should have spoken up
2 sooner, were you really surprised when a company like
3 Nestle, which has bought hundreds of millions of dollars
4 worth of stuff in one of these categories, is put out that
5 it's not getting discovery on apparently the only purchases
6 that are keeping it in this case or have it in this case in
7 the first place?

8 MS. ABERG: Well, Your Honor, our position on that
9 would be that it's really Nestle's job to figure out what
10 pork products it bought and make sure that it's getting data
11 on those products. We, as defendants, we are defending --

12 THE COURT: I can, I can even concede that. But
13 what I'm saying is you're sort of taking a tone of we're
14 surprised, we're caught flat-footed, we can't believe
15 they're doing this. And I'm just saying, you know, really?
16 Because you presumably know when you're selling hundreds of
17 millions of dollars worth of material to a customer, and you
18 can't be completely -- you might think it wrong of the
19 customer to do this or the plaintiff to do this, but you
20 can't really say that you are surprised when that customer
21 speaks up about the discovery in this case, can you?

22 MS. ABERG: So I take your point on that, Your
23 Honor. I would say that, you know, defendants are in the
24 position of defending litigation against 60-plus direct
25 action plaintiffs. New complaints coming in all the time.

1 We, we don't necessarily have perfect visibility into which
2 types of products each bought. Nestle, for example, brought
3 a complaint on behalf of two different entities, not just
4 Nestle PetCare, but also Nestle USA, a company that did buy
5 other products, including products for which data was
6 produced. So it's not as if the complaint came in and we're
7 thinking, oh, these, these guys bought nothing from us that
8 is part of the case. There are other products that Nestle
9 USA purchased from defendants.

10 Now, finally, in addition to the prejudice to
11 defendants, the DAPs have also just simply failed to comply
12 with applicable discovery deadlines. They agreed to a
13 schedule that set a deadline to negotiate additional
14 structured data requests, and then they did nothing before
15 that deadline, and that, again, caused serious prejudice to
16 defendants.

17 Now --

18 THE COURT: Oh, sorry. I thought -- please
19 continue.

20 MS. ABERG: Just moving on to the proportionality
21 analysis, which is, which is really the second prong of what
22 we're arguing here. You know, on the firsthand we would
23 argue that offal and byproducts and multi-protein and
24 multi-ingredient products, the products the DAPs are now
25 seeking, are just not relevant to the DAPs' claims. This

1 entire case is about pig meat, also known as "pork." Bones
2 are not meat; blood is not meat. And DAPs say nothing in
3 their brief about why this court should find otherwise.

4 You know, Mr. Eddy said that we haven't made any
5 arguments about relevance. In fact, the burden is on the
6 DAPs to establish the relevance of the products that they
7 are now seeking. And we actually have said, said plenty
8 about why the products are not relevant. And we would be
9 interested in what the DAPs have to say about why they are,
10 beyond simply we bought them, because the fact that they
11 purchased them does not mean that they are subject to an
12 antitrust price-fixing conspiracy.

13 Now, the DAPs argue that they issued RFPs seeking
14 the data on these disputed products back in October of 2021.
15 They did not. The definition from their RFPs defines "pork"
16 as pig or swine meat, sold or purchased, fresh or frozen,
17 including smoked ham, sausage and bacon. We don't think
18 these products fall into that definition, and it was that
19 definition that we negotiated with the other plaintiffs in
20 the case back in the spring.

21 And so, again, we don't admit that there are gaps,
22 and we don't admit that we were negotiating exclusions from
23 the definition. We were negotiating the interpretation of
24 the definition.

25 And Mr. Eddy also referenced a letter from Tyson

1 stating that we had produced data on certain products,
2 including lunch meat and sausage, and implying, I think,
3 that there was something incorrect about that or that caused
4 them to be confused. But we did produce data on sausage and
5 lunch meat, single protein sausage of which there are
6 thousands of SKUs and lunch meat. Yeah, it has been
7 produced.

8 So the idea that there's been this very narrow
9 products scope negotiated between the parties is just not
10 correct. It's a very, very broad definition, much broader,
11 Your Honor, than, frankly, defendants would have liked. We
12 did not agree that this case was about lunch meat or sausage
13 or anything else. We really thought it should be limited to
14 raw commodity pork primals. But the class plaintiffs
15 negotiated with us and demanded that they get products on
16 these -- that they get data on these further processed
17 products, and we relented.

18 THE COURT: Well, you got something in exchange,
19 presumably.

20 MS. ABERG: Yeah, I -- mainly we got --

21 THE COURT: -- negotiating properly, you got
22 something in exchange. You just didn't give it up.

23 MS. ABERG: Yeah, I mean, we got the exclusion of
24 these other products.

25 THE COURT: Okay. All right. More or --

1 MS. ABERG: Yeah. And now, of course, turning to
2 burden. You know, we would contend that even if these
3 products are marginally relevant, the need for the data is
4 outweighed by the high burdens of production. Probably not
5 too much to say about this. We've submitted --

6 THE COURT: No. I think plenty has been said.

7 MS. ABERG: Okay.

8 THE COURT: This can be short.

9 MS. ABERG: Yes.

10 THE COURT: Okay.

11 MS. ABERG: So, yeah, we submitted declarations.
12 I'm happy to provide details about any of, any of the
13 specifics that we've put in there, but, suffice it to say,
14 data production very burdensome. It would be burdensome to
15 collect the additional data that is sought. And,
16 accordingly, and especially given the low level of
17 relevance, we don't think that that burden is justified.

18 And just as one final point, I want to address
19 this refrain that DAPs cannot be bound by discovery
20 agreements that they weren't involved in negotiating. We --
21 our position, first of all, is that it should not be
22 presumed that DAPs get to come in and negotiate all their
23 own discovery agreements in this case.

24 Judge Tunheim acknowledged as recently as
25 yesterday in his order that DAPs are not necessarily

1 entitled to additional requests. In his order that he
2 issued yesterday he stated that the court would, quote, not
3 assume that additional structured data requests or new
4 proposed search terms will necessarily be deemed
5 proportional to the needs of the case.

6 And then, finally, we contend that DAPs' interests
7 were promoted and protected in the negotiated product scope
8 agreements that were reached in April of 2021 by able class
9 counsel.

10 THE COURT: All right. Thank you very much.

11 Mr. Eddy, let's go back to you. And confining
12 yourself to points that Ms. Aberg made, rebuttal.

13 MR. EDDY: Your Honor, you will not see my firm
14 listed on any of the exhibits that the defendants put
15 forward. There was confusion in the spring of this year.
16 And once we learned of this agreement to exclude, we acted
17 promptly. The defendants are essentially saying we waived
18 our right to these data. That's simply untrue. Once we
19 learned --

20 THE COURT: Well, let's, let's break that down a
21 little bit. I mean, after you finished on your direct
22 remarks, Mr. Ahern had some things he wanted to say; and the
23 first thing he said was, you know, contrary to what you've
24 heard, I was in the room when this was negotiated.
25 Mr. Ahern and you are both lawyers representing the direct

1 purchaser plaintiffs or direct action DAPs. And, I mean, I
2 don't wish to sound flippant, but do you guys talk to each
3 other? I mean, how could you have been surprised that this
4 had been negotiated?

5 MR. EDDY: We understood we have -- we got their
6 data. And Mr. Ahern even admitted his views were not in the
7 agreement. When we got their data, we saw inconsistent
8 results. Clemens Corporation produced all their data. So
9 we had to ask our consultants, were all these data excluded
10 or were they produced? And it varied. And that's -- that
11 caused us to, you know, make sure we were correct in our
12 approach on this. We didn't want to go file a motion to
13 compel on one and then another one on another company. The
14 bottom line is even Mr. Ahern doesn't represent my clients.
15 His clients don't buy offal and rendering products.

16 And let me say --

17 THE COURT: I'm not making that point. What my
18 point is, is that Mr. Ahern has, in my view, put himself out
19 there as a percipient witness to this agreement, and both
20 Mr. Ahern and you are representing DAPs. And that's, I
21 think, all I need to say and also all I can say, because I
22 think that's as far as the evidence goes.

23 MR. EDDY: The reality is, Your Honor, we asked
24 Mr. Ahern, once we started to see gaps, what happened, what
25 was going on. And he said, I never reached a deal. And

1 that's all he told us. And so that was the same time we
2 learned. This was in February and March. We didn't sit on
3 our hands.

4 And the cases cited by the defendants simply have
5 no bearing on this situation. They were failure to meet and
6 confer, missing deadlines to file motions. We haven't done
7 that. In fact, the motion deadline was extended by the
8 defendants in covering this.

9 And as to burden, we met and conferred in good
10 faith with these defendants; and never once did Tyson say
11 there were thousands of SKUs, not once, never. And I
12 specifically asked Mr. Taylor, please tell us the burden
13 here; we want to understand; we can't address something in
14 the abstract. I heard nothing. My response from him was,
15 well, show us that you bought some of these products from
16 us. And I did. And that was the end of it. He never said
17 a word after that.

18 So there's a two-way street on meet and confer.
19 We did everything we could. You can look at the
20 correspondence and see that. The defendants just said no,
21 no, no, no. They didn't give us anything on burden. If
22 they had given us thousands of SKUs, we would have worked
23 with them to try and narrow it down to what was relevant,
24 but they didn't, and now we're stuck with the first time we
25 hear this is in a declaration submitted on September 29th,

1 and that's --

2 In terms of proportionality, Your Honor, the
3 Broiler Chickens case, in which Tyson and counsel in this
4 case were deeply involved, they produced data on offal, they
5 produced data on rendering to my client Nestle Purina.
6 Nestle Purina is no surprise to them in this case. They
7 know exactly what they bought. And, you know, they were
8 ordered by the court, put in an order of Judge Gilbert in
9 the Broilers case, there was an agreement between the
10 defendants and the class in that case to produce data
11 through 2017. The court approved that agreement. I mean,
12 basically, it was in writing, ordered by the court. Two
13 years later the class changes its mind and seeks two more
14 years of all the data that had been produced from all 20
15 defendants. The result was Judge Gilbert agreed with the
16 class that the data was relevant and recognized that while
17 there was some burden it was proportional. You know, these
18 defendants have done that. Tyson was in that case. JBS
19 subsidiary Pilgrim's Pride was in that case. And, you know,
20 unlike Broilers, we were not parties to that agreement, the
21 class was.

22 And we feel that there are other instances in this
23 year. For example, Indiana Packers, a third party
24 processor, was ordered to produce five years of structured
25 data for 800 products. They did it in two months.

1 Defendants themselves issued a subpoena to another
2 third party processor called Sioux-Preme. I'll have to
3 spell that for the court reporter later. And Sioux-Preme
4 produced 13 years of data. This subpoena was issued in May
5 when we issued our letter to the defendants. They issued a
6 subpoena to a third party processor, Sioux-Preme, asking for
7 13 years of structured data on more than a thousand
8 products, and that data was produced in two months.

9 So I think the defendants claim and throw out wild
10 notions of burden and lack of proportionality when they
11 themselves have obtained similar data without a hassle. And
12 the bottom line is this data is critical to my clients. And
13 I will leave it there, Your Honor.

14 THE COURT: All right. Thank you very much.

15 Mr. Ahern, do you have anything you want to add?

16 MR. AHERN: Yes. I mean, Your Honor, first of
17 all, when we were, when we were negotiating the case
18 management order in this case initially, I was asked to, to
19 opine on or join in a section that related to what would
20 happen to future DAPs. And I said I can't do that. I don't
21 represent them. Okay?

22 Number two is I don't know if I said I was in the
23 room today or if I said I was there, but I'm not sure it
24 makes a heck of a lot of difference if, if my voice was not
25 being heard and in terms of not agreeing, and I sent emails

1 saying I'm not agreeing.

2 Third point. They never told me to go file a
3 motion to compel if I didn't like it. What they said was we
4 feel that this issue has been decided; the classes and the
5 defendants negotiated this deal; Winn-Dixie was part of
6 those discussions. That is Mr. Taylor's email to me right
7 before we were supposed to meet and confer about this saying
8 it's over, it's done. They would not consider anything
9 because at that point they said it was too late, even though
10 they sent me that email at 7:25 p.m. on May 5th.

11 So those are the points I wanted to make, Your
12 Honor.

13 THE COURT: Okay.

14 MS. ABERG: Your Honor, may I respond?

15 THE COURT: Just hold. A lot of people were
16 talking at once there.

17 Ms. Aberg, I don't know that it's necessary for
18 you to say anything. You know, the way it works is the
19 moving parties go, the defending party goes, then there's
20 time for rebuttal. We've done that. The issues have been
21 thoroughly briefed. They've been well and thoroughly argued
22 here today. And I am going to close the record at this
23 point on this particular dispute. Okay?

24 So thank you all very much. The motion is under
25 advisement, and we will get out an order in due course. All

1 right?

2 MR. EDDY: Thank you, Your Honor.

3 MS. ABERG: Thank you, Your Honor.

4 THE COURT: Thank you. Thank you all very much.

5 Have a good evening.

6 MR. AHERN: Thank you, Your Honor.

7 (Court adjourned at 4:55 p.m., 10-05-2022.)

8 * * *

9 I, Renee A. Rogge, certify that the foregoing is a
10 correct transcript from the record of proceedings in the
11 above-entitled matter.

12 Certified by: /s/Renee A. Rogge
13 Renee A. Rogge, RMR-CRR
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